

STATE OF TEXAS

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**CONTRACT FOR SERVICES**

COUNTY OF DALLAS

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This Contract for Services (“Contract”) is made and entered into as of the 1st day of October, 2014 by and between the Town of Addison, Texas (the “City”) and the WaterTower Theatre Incorporated (“WTT”), a Texas non-profit corporation with its principal place of business in Addison, Dallas County, Texas.

**WHEREAS**, WTT is a Texas non-profit corporation which exists for the purpose of the development and advancement of theatre and drama in the City as well as to promote theatrical activities through numerous productions throughout the year; and

**WHEREAS**, WTT’s productions and work attract tourists to and encourages tourism in the City, and the City has an interest in attracting such tourists and promoting tourism to the area in order to receive the economic benefits associated therewith; and

**WHEREAS**, it is the City’s desire to encourage and promote the arts, including, without limitation, theatre; and

**WHEREAS**, the City is authorized to expend revenues from its hotel occupancy tax for the encouragement, promotion, improvement, and application of the arts, including, without limitation, theatre, and desires to encourage and promote the arts (including theatre) through the execution of this Contract for Services.

**NOW THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth, the benefits flowing to each of the parties hereto, and other good and valuable consideration, the City and WaterTower Theatre Incorporated do hereby contract and agree as follows:

**I. TERM**

The term of this Contract shall be for a period of one year from the 1st day of October, 2014 through the 30th day of September, 2015, except as otherwise provided for herein.

**II. SERVICES**

WTT shall provide the following services:

- (a) Presentation of a minimum of five (5) main stage productions, one (1) season extra production, and The Out of the Loop Festival.
- (b) Recognition of the City in all playbills printed in connection with the productions.
- (c) Work with all hotels located in the City to generate awareness regarding the theatre.

(d) Work and coordinate with the City's Special Events Department to promote and market City events, with details regarding the same to be determined by the City, in consultation with WTT, during the City's 2014-2015 fiscal year.

(e) Submit detailed quarterly financial statements and program results to the City within thirty (30) days after the end of the preceding quarter listing the expenditures made by WTT with the revenues received pursuant to this Contract.

### III. COMPENSATION

The City agrees to pay WTT as base consideration the sum of Two Hundred Ninety Five Thousand and No/100 Dollars (\$295,000.00) "Base Consideration" from its revenue derived from the City's hotel occupancy tax, provided that the minimum number of shows are actually presented and performed as set forth in this Contract. Payment of the Base Consideration to WTT will be made by the Town on or before January 1, 2015. In addition to the Base Consideration as provided above, the City agrees to pay to WTT "Matching Funds" in an amount up to One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00). A description of what constitutes Matching Funds and the process for the payment of such Funds is set forth in Exhibit A attached hereto and incorporated herein.

In the event the City terminates this Contract as provided for in Section V, the City shall not be liable to WTT for the payment of any portion of the unpaid funds. The City also reserves the right to pursue all legal remedies against WTT for funds previously paid to WTT in the event WTT defaults on any term of this Contract.

### IV. RESPONSIBILITY; INDEMNIFICATION

(a) WTT AGREES TO ASSUME AND DOES HEREBY ASSUME ALL RESPONSIBILITY AND LIABILITY FOR DAMAGES OR INJURIES SUSTAINED BY PERSONS OR PROPERTY, WHETHER REAL OR ASSERTED, BY OR FROM THE PERFORMANCE OF SERVICES PERFORMED AND TO BE PERFORMED HEREUNDER BY WTT OR BY ITS OFFICIALS, OFFICERS, EMPLOYEES, OWNERS, MEMBERS, AGENTS, SERVANTS, INVITEES, GUESTS, VOLUNTEERS, CONTRACTORS, SUBCONTRACTORS, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE.

(b) **WTT'S Indemnification Obligation:** WTT covenants, agrees to, and shall DEFEND (with counsel reasonably acceptable to the Town of Addison, Texas), INDEMNIFY, AND HOLD HARMLESS the Town of Addison, Texas and the Town of Addison, Texas' elected officials, its officers, employees, representatives, agents and volunteers (the Town of Addison, Texas and the elected officials, the officers, employees, representatives, agents, and volunteers of the Town of Addison, Texas being each an "Addison Person" and collectively "Addison Persons") from and against any and all claims, liabilities, judgments, lawsuits, demands, harm, losses, damages, proceedings, suits, actions, causes of action, liens, fees, fines, penalties, expenses, or costs, of any kind and nature whatsoever made upon or incurred by the City and/or any other Addison Person, whether directly or indirectly, (the "Claims") that arise

out of, result from, or relate to: (i) the performance or provision by WTT of the WTT Services as described above in Section II of this Contract, (ii) any representations and/or warranties by WTT under this Contract, and (iii) any act or omission under, in performance of, or in connection with the WTT Services and/or this Contract by WTT or by any of WTT's owners, directors, officers, shareholders, managers, partners, employees, agents, consultants, contractors, subcontractors, invitees, guests, customers, licensees, sublicensees, or any other person or entity for whom WTT is legally responsible, and their respective owners, directors, officers, shareholders, managers, partners, employees, agents, consultants, contractors, subcontractors, invitees, guests, customers, and licensees ("WTT Persons"). **SUCH DEFENSE, INDEMNITY AND HOLD HARMLESS SHALL AND DOES INCLUDE CLAIMS ALLEGED OR FOUND TO HAVE BEEN CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF ANY ADDISON PERSON, OR CONDUCT BY ANY ADDISON PERSON THAT WOULD GIVE RISE TO STRICT LIABILITY OF ANY KIND.** However, WTT's liability under this clause shall be reduced by that portion of the total amount of the Claims (excluding defense fees and costs) equal to the Addison Person or Addison Persons' proportionate share of the negligence, or conduct that would give rise to strict liability of any kind, that caused the loss. Likewise WTT's liability for Addison or any other Addison Person's defense costs and attorneys' fees shall be reduced by that portion of the defense costs and attorneys' fees equal to the Addison Person or Addison Persons' proportionate share of the negligence, or conduct that would give rise to strict liability of any kind, that caused the loss.

WTT shall promptly advise Addison in writing of any claim or demand against any Addison Person or WTT or any other WTT Persons related to or arising out of WTT's Services and activities under this Contract and shall see to the investigation and defense of such claim or demand at WTT's sole cost and expense. Addison Persons shall have the right, at the Addison Persons' option and own expense, to participate in such defense without relieving WTT of any of its obligations hereunder.

The indemnity, hold harmless, and defense obligations set forth herein shall survive the expiration or termination of this Contract.

## V. TERMINATION

(a) The City may terminate this Contract at any time if:

(1) WTT defaults on any provision of this Contract and fails to correct such default after thirty (30) days written notice of default from the City; or

(2) WTT fails to make any payment required under the Agreement For The Use of The Addison Theatre Centre within thirty (30) days after written notification of delinquency of payment by the City; or

(3) The City gives WTT at least sixty (60) days prior written notice; or

(4) WTT has offered, conferred, or agreed to confer any benefit upon a City employee or official that the City employee or official is prohibited by law from accepting; or

(5) If WTT should violate the provision in Section XII, Non-Discrimination and fails to correct the violations within thirty (30) days of written notice of the violation by the City.

## **VI. CONFLICT OF INTEREST**

(a) No officer or employee of the City shall have any interest or receive any benefit, direct or indirect, in this Contract or the proceeds thereof. This prohibition is not intended and should not be construed to preclude payment of expenses legitimately incurred by City officials in the conduct of WTT's business.

(b) For purposes of this section, "benefit" means anything reasonably regarded as an economic advantage, including benefit to any other person in whose welfare the beneficiary is interested, but does not include contributions or expenditures made and reported in accordance with any law.

## **VII. ACCOUNTING**

Prior to adopting its annual budget, WTT shall submit for the City's review a budget showing the use of the City's funds provided pursuant to this Contract, and WTT shall make such periodic reports to the City, as provided for herein, listing the expenditures made by WTT from the funds provided by the City. The approval of WTT's annual budget creates a fiduciary duty in WTT with respect to the funds provided by the City under this Contract.

The funds paid to WTT pursuant to this Contract shall be maintained in a separate account established for that purpose and may not be commingled with any other money. Funds received hereunder from the City may be spent for day-to-day operations, supplies, salaries and other administrative costs provided that such costs are necessary for the promotion and encouragement of the purposes for which the funds may be used as described herein.

WTT shall maintain complete and accurate financial records of all of its revenues, including, without limitation, each expenditure of revenue received pursuant to this Contract. By the thirtieth (30<sup>th</sup>) day after the close of each quarter (beginning with the quarter ending December 31, 2014, with the last quarter ending September 30, 2015), WTT shall provide the City the following: (a) a detailed financial report for the previous quarter listing the expenditures made by WTT of the funds paid to WTT under this Contract; and (b) a year-to-date report of the expenditures made by WTT of the funds paid to WTT under this Contract (and if this Contract is terminated prior to its expiration, WTT shall provide such reports as set forth above for the period prior to the expiration for which reports have not been provided, and such obligation shall survive the termination hereof; and the obligation to provide the reports for the last quarter of this Contract shall survive the expiration of this Contract). On request of the City at any time, WTT shall make its records available for inspection and review by the City or its designated representative(s). Within ninety (90) days of the end of WTT's fiscal year, WTT shall provide the City with a financial statement signed by the Chairman of WTT's Board of Directors (or

other person acceptable to the Town) and audited by an independent Certified Public Accountant, setting forth WTT's income, expenses, assets and liabilities, and such obligation shall survive the termination or expiration of this Contract.

All application materials, financial information, quarterly (or other) reports, any other information described herein or required hereunder, and general correspondence with the City must be submitted to the City in electronic format to the City email address specified in the application packet. Additionally, the City may require that such materials, information, reports, and correspondence also be provided to the City in writing (e.g., a hard-copy, non-electronic format).

### **VIII. INDEPENDENT CONTRACTOR**

In performing services under this Contract, the relationship between the City and WTT is that of independent contractor, and the City and WTT by the execution of this Contract do not change the independent status of WTT. No term or provision of this Contract or action by WTT in the performance of this Contract is intended nor shall be construed as making WTT the agent, servant or employee of the City, or to create an employer-employee relationship, a joint venture relationship, or a joint enterprise relationship.

### **IX. NON-ASSIGNABILITY; NO THIRD-PARTY BENEFIT**

WTT may not and shall have no authority to assign, transfer, or otherwise convey by any means whatsoever this Contract or any of the rights, duties or responsibilities hereunder without obtaining the prior written approval of the City, and any attempted assignment, transfer, or other conveyance of this Contract without such approval shall be null and void and be cause for immediate termination of this Contract by the City.

This Contract is solely for the benefit of the parties hereto and is not intended to and shall not be deemed to create or grant any rights, contractual or otherwise, to any third person or entity.

### **X. NO PARTNERSHIP, JOINT VENTURE, OR JOINT ENTERPRISE**

Nothing contained in this Contract shall be deemed to constitute that the City and WTT are partners or joint venturers with each other, or shall be construed or be deemed to establish that their relationship constitutes, or that this Contract creates, a joint enterprise.

### **XI. COPYRIGHT**

WTT assumes full responsibility for complying with all United States laws and treaty terms pertaining to intellectual property issues and any applicable regulations, including but not limited to the assumption of all responsibilities for paying all royalties which are due for the use of domestic or foreign copyrighted works in WTT's performances, transmissions or broadcasts, and WTT, without limiting any other indemnity given by WTT as set forth herein, AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE CITY, ITS OFFICIALS, OFFICERS,

EMPLOYEES, AND AGENTS, IN BOTH THEIR PUBLIC AND PRIVATE CAPACITIES, FROM AND AGAINST ANY LIABILITY, CLAIMS, OR DAMAGES (INCLUDING BUT NOT LIMITED TO COURT COSTS AND ATTORNEY'S FEES) GROWING OUT OF WTT'S INFRINGEMENT OR VIOLATION OF ANY STATUTE, TREATY TERM, OR REGULATION APPLICABLE TO INTELLECTUAL PROPERTY RIGHTS, INCLUDING BUT NOT LIMITED TO COPYRIGHTS.

## **XII. NON-DISCRIMINATION**

During the term of this Contract, WTT agrees that it shall not discriminate against any employee or applicant for employment because of race, age, color, sex or religion, ancestry, national origin, place of birth, or handicap.

## **XIII. LEGAL COMPLIANCE; CONTRACT SUBJECT TO LAWS; RECITALS**

WTT shall observe and abide by, and this Contract is subject to, all applicable federal, state, and local (including the City) laws, rules, regulations, and policies (including, without limitation, the Charter and Ordinances of the City), as the same currently exist or as they may be hereafter amended. The above and foregoing recitals to this Agreement are true and correct and incorporated herein and made a part hereof.

## **XIV. VENUE; GOVERNING LAW**

In the event of any suit or action under this Contract, exclusive venue for all suits or actions shall be instituted and maintained in Dallas County, Texas. This Contract shall be governed by and construed under and pursuant to the laws of the State of Texas without regard to choice of law rules of any jurisdiction.

## **XV. COUNTERPARTS**

This Contract may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

## **XVI. NO WAIVER; RIGHTS CUMULATIVE**

The failure by either party to exercise any right or power, or option given to it by this Contract, or to insist upon strict compliance with the terms of this Contract, shall not constitute a waiver of the terms and conditions of this Contract with respect to any other or subsequent breach thereof, nor a waiver by such party of its rights at any time thereafter to require exact and strict compliance with all the terms hereof. The rights or remedies under this Contract are cumulative to any other rights or remedies, which may be granted by law.

## **XVII. NOTICES**

All notices, communications and reports, required or permitted under this Contract shall be personally delivered or mailed to the respective parties using certified mail, return receipt requested, postage prepaid, at the addresses shown below. The City and WTT agree to provide the other with written notification within five (5) days, if the address for notices, provided below,

is changed. Notices by personal delivery shall be deemed delivered upon the date delivered; mailed notices shall be deemed communicated on the date shown on the return receipt. If no date is shown, the mailed notice shall be deemed communicated on the third (3rd) day after depositing the same in the United States mail.

The City's address:

Matthew McCombs  
Assistant to the City Manager  
Town of Addison  
5300 Belt Line Road  
Dallas, Texas 75254

WTT's address:

Terry Martin  
Producing Artistic Director  
WaterTower Theatre Incorporated  
15650 Addison Road  
Addison, Texas 75001

### **XVIII. SEVERABILITY**

The terms of this Contract are severable, and if any section, paragraph, clause, or other portion of this Contract shall be found to be illegal, unlawful, unconstitutional or void for any reason, the balance of the Contract shall remain in full force and effect and the parties shall be deemed to have contracted as if said section, paragraph, clause or portion had not been in the Contract initially.

### **XIX. AUTHORITY TO EXECUTE CONTRACT**

The undersigned officers and/or agents of the parties hereto are the properly authorized officials and have the necessary authority to execute this Contract on behalf of the parties hereto, and each party hereby certifies to the other that any necessary resolutions or other act extending such authority have been duly passed and are now in full force and effect.

### **XX. ENTIRE AGREEMENT**

This Contract represents the entire and integrated contract and agreement between the City and WTT and supersedes all prior negotiations, representations and/or agreements, either written or oral. This Contract may be amended only by written instrument signed by both the City and WTT.

**IN WITNESS THEREOF**, the parties hereto have caused this Contract to be signed by their proper corporate officers as first above specified, and have caused their proper corporate seal to be hereto affixed the day and year first above written.

**TOWN OF ADDISON, TEXAS**

**WATERTOWER THEATRE  
INCORPORATED**

By: \_\_\_\_\_  
Lea Dunn, City Manager

By: \_\_\_\_\_  
Terry Martin, Producing Artistic Director

EXHIBIT "A"  
TO  
2014-2015 CONTRACT FOR SERVICES  
BETWEEN THE TOWN OF ADDISON  
AND WATERTOWER THEATRE INCORPORATED

DESCRIPTION OF "MATCHING FUNDS" AND PROCESS FOR  
DISTRIBUTION OF MATCHING FUNDS  
FOR WATERTOWER THEATRE INCORPORATED  
FROM HOTEL/MOTEL TAX FUNDS

For each One Dollar of Theatre Funds (as defined herein) actually received by WTT, the City shall pay to WTT an equal amount ("Matching Funds") up to but not exceeding One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00). In order to receive Matching Funds, WTT shall provide to the City such proof of its receipt of Theatre Funds as the City shall reasonably require. WTT shall make application on or before the 15<sup>th</sup> day of each month for distribution of Matching Funds (beginning January 16, 2015) and the City shall pay such Matching Funds provided the City has received adequate proof, in the City's sole opinion, of the actual receipt of Theatre Funds by WTT as set forth in each application.

For purposes of this Agreement, the term "Theatre Funds" shall mean and include: (i) cash funds actually received by WTT during the term hereof from any gifts, grants, donations, or other cash contributions from any person or business entity (whether for-profit or non-profit), and (ii) that amount of funds determined by multiplying (a) the number of 2015 WTT season tickets sold by WTT on or before November 15, 2014, times (b) the average cost of a single season ticket, times (c) 25%. For purposes of this Agreement, the average cost of a single season ticket shall be \$110.00.